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# NOTES

## ANTITRUST—THE SUPREME COURT'S REJECTION OF IN PARI DELICTO AS A DEFENSE

### INTRODUCTION

In June of 1968, the Supreme Court, in deciding *Perma Life Mufflers, Inc. v. International Parts Corp.*,<sup>1</sup> rejected the common law doctrine of *in pari delicto*<sup>2</sup> as a defense in an antitrust action. The majority explicitly recognized that common law barriers, such as *in pari delicto*, are not to frustrate the purposes deemed to be served by private antitrust litigation. However, the majority did not clearly indicate whether a voluntary and active participant in an illegal scheme could be denied recovery on the basis of the principle underlying the *in pari delicto* defense. Furthermore, it does not appear that any meaningful criteria are provided to enable the courts to determine whether a plaintiff's participation in a scheme is voluntary or active.<sup>3</sup> Even if recovery is presumed, there may be difficulty in determining the amount of damages where the plaintiff has received benefits accruing from some provisions of an illegal scheme.<sup>4</sup>

Three Justices separately concurred in the result reached by the majority and each proposed a standard to be used by the courts in determining which plaintiffs should not be permitted to recover under the antitrust laws. Justice White agreed with the rejection of *in pari delicto*,

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1. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692 (7th Cir. 1966), *rev'd and rem'd*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

2. *In pari delicto* should not be confused with the related doctrine of unclean hands; the latter being an equitable maxim from which the former stems. Unclean hands is more comprehensive in that it recognizes unconscientious conduct and lack of good faith on the part of the plaintiff directly or indirectly relating to the subject matter of the action. See 1 POMEROY, EQUITY JURISPRUDENCE § 397-98 (5th ed. 1941); *Electrical Research Products v. Victaphone Corp.*, 20 Del. Ch. 417, 171 A. 738 (1934); *Vulcan Detinning Co. v. American Can Co.*, 72 N.J. Eq. 387, 67 A. 339 (1907).

However, *in pari delicto* applies only to the wrongful or illegal conduct in which the parties thereto are in equal fault or equally culpable. See *Pennsylvania Water & P. Co. v. Consolidated G.E.L. & P. Co.*, 209 F.2d 131 (4th Cir.), *cert. denied*, 347 U.S. 960 (1954); *Southwestern Greyhound Lines v. Crown Coach Co.*, 178 F.2d 628 (8th Cir. 1949); BLACK'S LAW DICTIONARY 898 (4th ed. 1951).

Where the fault of the parties is not equal, the related doctrine of *particeps criminis* is applicable and the courts will allow recovery by the party least responsible for the harm. Note, *Antitrust-Defenses of Pari Delicto and Unclean Hands*, 29 N.Y.U.L. REV. 1463 n.3 (1954).

3. See notes 128-36 *infra* and accompanying text.

4. See notes 146-49 *infra* and accompanying text.

yet would hold that where the parties bear *substantially equal responsibility*, recovery should be denied. Justices Fortas and Marshall believe that the majority rejection of the defense was erroneous. Instead, each proposed a standard for determining whether a plaintiff is *in pari delicto*. Justice Fortas would permit the defense where plaintiff has maintained an *equality of position*. Justice Marshall would bar plaintiff's action where the litigants are *substantially equally at fault*. However, the factors or elements provided by the concurring Justices as guidelines for the application of the various standards seem inadequate when applied to certain factual situations. For example, absent a showing of coercion, is one who has participated in the formulation of an agreement more responsible than another who has wholeheartedly accepted an agreement formulated by others?<sup>5</sup> Is there more of an *equality of position* or *substantially equal responsibility*? Is a plaintiff more *substantially equally at fault*?

Justice Harlan, joined by Justice Stewart, concurring in part and dissenting in part, contended that *in pari delicto* and its exceptions are useful in determining the right to maintain an antitrust action. They believe that the various views enunciated in *Perma*<sup>6</sup> are the result of a misunderstanding of the proper definition and standard to be used in applying the doctrine. The Justices would have remanded the case for a determination of whether plaintiff had *voluntarily violated the law in cooperation with the defendant*. However, they do not set forth the elements which a court may consider in determining whether plaintiff's action was voluntary, or the result of coercion. Is a plaintiff coerced into joining a defendant's illegal franchising arrangement when the resale of defendant's product constitutes only one-third of his total business?<sup>7</sup> Can it be said that he is a voluntary participant?

The purpose of this note is to analyze the opinions announced in *Perma*<sup>8</sup> and to discuss some of the difficulties the courts might encounter, including those stated above, if they were to apply the various standards set forth in *Perma*<sup>9</sup> to certain hypothetical situations<sup>10</sup> involving franchises.

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5. See notes 157-58 *infra* and accompanying text.

6. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

7. See notes 168-71 *infra* and accompanying text.

8. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

9. *Id.*

10. The illustrations are discussed in detail in a subsequent section of this note. See notes 116-83 *infra* and accompanying text.

HISTORY OF PERMA LIFE MUFFLERS, INC.  
V. INTERNATIONAL PARTS CORP.<sup>11</sup>

The defendant International Parts Corp. was organized in 1938 to manufacture and distribute automobile exhaust parts. In 1955 International fashioned a nationwide franchise plan designed to more effectively distribute its products. Each of the plaintiff-franchisees accepted a sales agreement, which was offered to them by Midas, Inc., a subsidiary of International. The contract provided that the franchisee was to purchase mufflers and other exhaust parts from no one other than Midas and was also obligated to maintain an inventory of Midas products.<sup>12</sup> The franchisee was required to sell only at specified locations and at resale prices set by Midas. Furthermore, the franchisees promised to honor the lifetime guarantee on any mufflers they sold and agreed not to deal with Midas' competitors.<sup>13</sup> Midas authorized the franchisees to use the service mark "Midas Muffler Shops" and the trade mark "Midas."<sup>14</sup> Midas also promised to bear the cost of honoring the lifetime guarantee. The franchisees did not pay a fee and were not required to procure or rent considerable amounts of equipment from Midas. Each franchisee was allotted an exclusive territory to sell "Midas" products. Either party could cancel the agreement upon thirty days written notice.<sup>15</sup> The unique features of the franchising arrangement were the lifetime guarantee, free fifteen minute installation and the establishment of shops specializing solely in servicing automobile exhaust systems.<sup>16</sup>

The plaintiff-franchisees participated in the plan for about four years during which time each sought and acquired additional territories in which to open new shops.<sup>17</sup> The franchisees profited from the arrangement.<sup>18</sup> Prior to cancellation of the sales agreements the franchisees collectively owned and operated twenty shops.<sup>19</sup> All were at one time members of the National Advisory Council, the representative body for all "Midas" dealers.<sup>20</sup> Four developments were apparently the cause of

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11. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

12. 88 S. Ct. at 1983.

13. *Id.*

14. *Id.*

15. *Id.*

16. Petitioner's Reply Brief at 9, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968); Brief for Respondents at 7-9, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981 (1968).

17. Brief for Respondents at 13, 14, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

18. *Id.* at 13.

19. *Id.* at 14.

20. *Id.*; Petitioner's Reply Brief at 4, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

the franchisees' dissatisfaction which finally culminated in the unilateral cancellation of the agreement by three of them.<sup>21</sup> Midas altered the guarantee expense arrangement to require the franchisees to bear one-half of the replacement cost;<sup>22</sup> Midas would not execute additional franchise agreements to include larger exclusive territories;<sup>23</sup> pressure was brought to bear on those dealers who were selling products of Midas' competitors or offering services in addition to exhaust system service;<sup>24</sup> and a Midas competitor initiated a franchise system which apparently did not include many of the objectionable requirements of the Midas arrangement.<sup>25</sup>

Thereafter, plaintiff-franchisees filed suit to recover damages caused by International's<sup>26</sup> alleged antitrust violations. The complaint consisted of three counts arising under section 2 of the Clayton Act,<sup>27</sup> section 1 of the Sherman Antitrust Act,<sup>28</sup> and section 3 of the Clayton Act.<sup>29</sup> In a

21. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1984 (1968).

22. Petitioner's Brief for Certiorari at 5-6 n.3, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

23. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692, 699 (7th Cir. 1966); Brief for Respondents at 14, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

24. Petitioner's Reply Brief at 22-28, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1985-86 (1968).

25. Brief for Respondents at 14 n.9, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692, 695 (7th Cir. 1966).

26. "The defendants were International Parts Corporation, three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692, 693 (7th Cir. 1966).

27. Clayton Act § 2, 15 U.S.C. § 13(a) (1964):

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . .

28. Sherman Act § 1, 15 U.S.C. § 1 (1964):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

29. Clayton Act § 3, 15 U.S.C. § 14 (1964):

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . or fix a price . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors

memorandum opinion, the district court<sup>80</sup> granted the defendant's motion for summary judgment on all claims, holding that the plaintiff-franchisees were *in pari delicto*.<sup>81</sup> The court of appeals affirmed the decision as to the counts based upon section 3 of the Clayton Act<sup>82</sup> and section 1 of Sherman Act<sup>83</sup> but reversed with respect to the Clayton Act section 2 violation of price discrimination.<sup>84</sup> Relying on the rule enunciated in *Crest Auto Supplies, Inc. v. Ero Mfg. Co.*,<sup>85</sup> the court stated:

In resume, each plaintiff initially asked to become a participant in the Midas merchandising program and voluntarily, willingly and knowingly executed his first Midas franchise agreement. Each plaintiff at all times had the legal right to abandon the Midas program and to cancel these franchise agreements on 30 days' written notice. . . . Each plaintiff sought to perpetuate the "wrong" of which he now complains by acquiring additional franchises. . . .

....

It would be difficult to visualize a case more appropriate for the application of the *in pari delicto* doctrine.<sup>86</sup>

Justice Cummings dissented on the ground that he interpreted the Supreme Court's opinion in *Simpson v. Union Oil Co.*<sup>87</sup> as rejecting the defense of *in pari delicto*. The Supreme Court granted *certiorari* to decide the issue.<sup>88</sup>

#### ANALYSIS: THE SUPREME COURT OPINIONS IN PERMA

##### *The Majority Opinion*

Justice Black, speaking for the Court, stated in his majority opinion

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of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

30. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 1966 Trade Cas. ¶71,801 (N.D. Ill.).

31. For cases permitting the defense see *Kershaw v. Kershaw Mfg. Co.*, 327 F.2d 1002 (5th Cir. 1964); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943) (dictum), *cert. denied*, 321 U.S. 792 (1944); *Tilden v. Quaker Oats Co.*, 1 F.2d 160 (7th Cir. 1924); *Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1 (3d Cir. 1917); *Selmer Inc. v. Musical Instrument Exch. Inc.*, 154 F. Supp. 697 (S.D.N.Y. 1957); *New York Credit Men's Adjustment Bureau Inc. v. Brune-New York Inc.*, 120 F. Supp. 495 (S.D.N.Y. 1954); *Morny v. Western Tel. Co.*, 40 F. Supp. 193 (S.D.N.Y. 1940).

32. 15 U.S.C. § 14 (1964).

33. 15 U.S.C. § 1 (1964).

34. 15 U.S.C. § 13 (1964).

35. 360 F.2d 896 (7th Cir. 1966).

36. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692, 699 (7th Cir. 1967).

37. 377 U.S. 13 (1964).

38. 389 U.S. 1034 (1968).

that "the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."<sup>39</sup> He immediately expressed dissatisfaction with the historical application of the defense by stating, "[N]othing in the language of the antitrust act . . . indicates that Congress wanted to make the common-law *pari delicto* doctrine a defense to treble damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist."<sup>40</sup>

Justice Black premised his rejection of the defense upon the "important public purposes"<sup>41</sup> served by encouraging private antitrust suits—"to further the overriding public policy in favor of competition"<sup>42</sup> even to the extent of "permitting the plaintiff to recover a windfall gain."<sup>43</sup> Therefore, even though plaintiff would seem to be as morally blameworthy as the defendant, recovery is to be allowed to serve as "an ever present threat to deter anyone contemplating business behavior in violation of the antitrust laws."<sup>44</sup> Thus, it is not the equities between the parties with which the courts should be concerned, but the usefulness of the private action as an enforcement agency of antitrust law.

Relying upon *Simpson*<sup>45</sup> and *Kiefer-Stewart Co. v. Seagram & Sons*,<sup>46</sup> the Court issued a directive to the lower courts that plaintiffs in class actions, such as those in *Perma*,<sup>47</sup> are not to be denied their right of action merely because they could have refused to deal with the defendant and, failing to do so, entered the arrangement with their "eyes open."<sup>48</sup>

Justice Black stated that the plaintiffs' "participation was not voluntary in any meaningful sense."<sup>49</sup> The entire arrangement was thrust upon them by Midas; and, therefore, the "plaintiff[s] did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it."<sup>50</sup> They only attempted "to make the best of a bad situation."<sup>51</sup> He viewed the franchising arrangement as an "attractive business opportunity"<sup>52</sup> of which the plaintiffs could take advantage only by consenting to the oppressive terms of the agreement, which was

39. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1985 (1968).

40. 88 S. Ct. at 1984.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

46. 340 U.S. 211 (1951).

47. 392 U.S. 134, 88 S. Ct. 1981 (1968).

48. *Simpson v. Union Oil Co.*, 311 F.2d 764, 768 (9th Cir. 1963).

49. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1985 (1968).

50. 88 S. Ct. at 1985.

51. *Id.*

52. *Id.*

"formulated and carried out by others."<sup>53</sup> It was only as a result of threats and pressure from the Midas representatives, which negated any idea of complete involvement and participation, that the plaintiffs continued to operate under these terms. As such, it was unnecessary for the Court to decide "whether . . . truly complete involvement and participation in a monopolistic scheme could ever be a basis . . . for barring a plaintiff's cause of action"<sup>54</sup> notwithstanding the *in pari delicto* doctrine.

Concerning the possibility that the plaintiffs might be unjustly enriched, Justice Black said, "The possible beneficial by-products of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages. . . ."<sup>55</sup>

### *The Concurring Opinions*

#### Justice White

Justice White joins the majority opinion in rejecting the usefulness of the doctrine in antitrust law since "the *in pari delicto* defense in its historic formulation is not a useful concept for sorting out those situations in which a plaintiff might be barred because of his own conduct from those in which he may have been a party to an illegal venture but is still entitled to damages from other participants."<sup>56</sup> He believes that private antitrust suits should be decided by "hewing closer to the aims and purposes of Section 4 of the Clayton Act"<sup>57</sup> rather than with regard to equitable doctrines.

Justice White, while agreeing that *in pari delicto* is not desirable in antitrust litigation, noted that reliance upon precedent would have required reversal of the court of appeals' decision. In reading the record he finds that the defendant used its superior bargaining power to thrust the illegal arrangement upon the plaintiffs. Since plaintiffs' actions were not voluntary, their participation in the unlawful combination should not bar recovery. *Kiefer-Stewart*,<sup>58</sup> *Bales v. Kansas City Star Co.*<sup>59</sup> and *Jewel Tea Co. v. Local Unions*<sup>60</sup> have reaffirmed the principle enunciated by the Court in *Eastman Kodak Co. v. Southern Photo Materials Co.*:<sup>61</sup> that once it is shown that the defendant used leverage in the form of

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1987.

57. *Id.*

58. *Kiefer-Stewart Co. v. John E. Seagram & Sons*, 340 U.S. 211 (1951).

59. *Bales v. Kansas City Star Co.*, 336 F.2d 439 (8th Cir. 1964).

60. *Jewel Tea Co. v. Local Unions*, 274 F.2d 217 (7th Cir.), *cert. denied*, 362 U.S. 936 (1960).

61. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).



superior market power to coerce the plaintiff into joining the illegal scheme, the plaintiff will not be denied recovery because he is *in pari delicto*. Regardless of the recognition by Justice White of the applicability of this doctrine to *Perma*,<sup>62</sup> he denounces it, possibly expressing apprehension that its application will in many instances conflict with the legislative policy as expressed in the antitrust laws.

Unlike Justice Black, Justice White sets out a criterion by which courts should permit or deny recovery—the primary objective apparently being to deter others from violating the law and thus presumably to further competition.<sup>63</sup> The test is phrased as “substantially equal responsibility”<sup>64</sup> and when stated as a generality, “would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permit recovery in favor of the one least responsible where one is more responsible than the other. This rule would simply pose the issue of causation in a particularized form.”<sup>65</sup> Thus, it may be said that the position assumed by Justice White emphasizes the causal relationship of the conspirator’s actions and the ultimate damage suffered by one of the parties as the necessity of proof in determining the right of recovery. As shown by Justice White’s analysis of the hypotheticals set forth in his opinion,<sup>66</sup> the application of such an approach would seem to be consistent with the deterrent purposes of section 4 of the Clayton Act.<sup>67</sup>

Neither does Justice White foresee any difficulties in practical application of the “substantially equal responsibility”<sup>68</sup> test. Evidence deemed to establish the final allocation of respective responsibility would be:

[F]acts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably would have been expected to benefit from the provision or conduct making the scheme illegal under § 1; proof of whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement.<sup>69</sup>

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62. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1988 (1968).

63. 88 S. Ct. at 1988.

64. *Id.*

65. *Id.*

66. *Id.* at 1987, 1988.

67. 15 U.S.C. § 15 (1964).

68. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1988 (1968).

69. 88 S. Ct. at 1988.

Justice White concluded that the evidence set forth in the record was insufficient to show that plaintiffs were as responsible as the defendants for the illegal arrangement.<sup>70</sup>

Justice Fortas

Justice Fortas, concurring in the result, disagreed with the majority's rejection of *in pari delicto*: "The doctrine has . . . a significant if limited role in private antitrust law. If the fault of the parties is reasonably within the same scale—if the 'delicto' is approximately 'pari'—then the doctrine should bar recovery."<sup>71</sup> He explains the standard as an "equality of position,"<sup>72</sup> which apparently refers to the quality of plaintiff's participation. "Unless the doctrine is so limited, the private remedy provided by the antitrust laws is nullified to a significant extent."<sup>73</sup> Thus, he reiterates the importance of the "petitioners right to recover in their own interest and as 'private attorneys general' to enforce the antitrust laws,"<sup>74</sup> but believes that *in pari delicto*, when properly applied, will render results consistent with the policy expressed in the antitrust laws.

The reasoning behind Justice Fortas' "equality of position"<sup>75</sup> theory appears to be explained for the most part by considering the circumstances as they existed when the aggrieved party became a member of the unlawful arrangement. It would seem to follow that one who is coerced into entering a plan formulated by others, as were the plaintiffs in *Ring v. Spina*<sup>76</sup> and *Simpson*,<sup>77</sup> is not in an equal position of participation with a defendant. "The antitrust laws are intended to protect individuals 'from combinations fashioned by others and offered to [them] . . . as the only feasible method by which [they] may do business.'"<sup>78</sup>

In this respect the "equality of position"<sup>79</sup> and "substantially equal responsibility"<sup>80</sup> tests are similar. Although expressed in somewhat different terms, the common thread running through each approach is the idea that market power and coercion, in effect, result in a greater "quality" of participation by the defendant than by the plaintiff.

70. *Id.*

71. *Id.* at 1989.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945).

77. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

78. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1989 (1968).

79. 88 S. Ct. at 1989.

80. *Id.*

Moreover, Justice Fortas would go further in examining the relative position of the parties by applying his test to each provision upon which plaintiff alleges damages. Thus, the petitioner could be found to be a co-conspirator or co-formulator "with respect to a *particular aspect* of the plan—for example, if he *originated and insisted* upon the inclusion of a territorial exclusivity clause which was not in the franchise as drafted by the franchisor. He could not recover damages based upon this if, essentially, it was his own act."<sup>81</sup>

Justice Marshall

Justice Marshall, while agreeing with the result reached by the majority, could not accept "the holding that the doctrine of *in pari delicto* has no place in a treble damage antitrust action."<sup>82</sup> In the first place he sees no reason for the broad rejection of the defense since, upon the facts, the same result would be reached if *in pari delicto* were properly applied.

He denounces a "mechanical" application of the doctrine to private antitrust actions, possibly implying a criticism of the liberal use of summary judgments by the lower courts in disposing of the *in pari delicto* question.<sup>83</sup> However, Justice Marshall believes that "a limited application of the basic principle behind the doctrine of *pari delicto* is both proper and desirable in the antitrust field."<sup>84</sup>

Justice Marshall also sets forth an approach for the proper application of *in pari delicto*: "[I] would hold that where a defendant in a private antitrust suit can show that a plaintiff actively participated in the formation and implementation of an illegal scheme, and is *substantially equally at fault*, the plaintiff should be barred from imposing liability on the defendant."<sup>85</sup> Furthermore, the rule set forth in *Simpson*<sup>86</sup>—"[T]he mere fact that a party enters into an agreement containing provisions that are violative of the antitrust laws with the intent to make money by operating under the agreement is not in itself sufficient to show that he is *equally responsible* for the existence of the illegal provisions"<sup>87</sup>—

81. *Id.*

82. *Id.*

83. *Pennsylvania Water & P. Co. v. Consolidated G.E.L. & P. Co.*, 209 F.2d 131 (4th Cir. 1954); *Singer v. A. Hollander & Son*, 202 F.2d 55 (3d Cir. 1953); *Crawford v. Colby Broadcasting Corp.*, 259 F. Supp. 599 (N.D. Ill. 1966), *rev'd*, 387 F.2d 796 (7th Cir. 1967); *Rayco Mfg. Co. v. Dunn*, 234 F. Supp. 593 (N.D. Ill. 1964).

84. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1989 (1968).

85. 88 S. Ct. at 1989, 1990 (emphasis added).

86. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

87. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1990 (1968) (emphasis added).

clearly indicates that entering a contract does not establish equality of fault between the parties.

In his view, since the record contains ample evidence that plaintiffs did not support all of the unlawful provisions, the summary judgment was erroneous. On remand, if the defendant can establish that any of the restrictive provisions<sup>88</sup> were inserted "at the behest and for the benefit"<sup>89</sup> of the plaintiffs, recovery of any damages resulting from such provisions should be denied since the plaintiffs' responsibility for the existence of those provisions would make their "fault" equal to or in excess of the defendant's. But denial of damages based on these provisions, according to Justice Marshall, does not expand to bar recovery upon the entire agreement. If the defendant, Midas, can show that the plaintiff-franchisees "actually participated in the formulation of the entire agreement, trading off anticompetitive restraints on their own freedom of action . . . for anticompetitive restraints intended for their benefit . . . petitioners should be barred from seeking damages as to the agreement as a whole."<sup>90</sup>

His reasons for disagreeing with the majority's rejection of the doctrine are "less related to the public interest in eliminating all forms of anticompetitive business conduct and more related to the equities as between the parties."<sup>91</sup> He does submit, due to the strong public interest in favor of competition, that the morality of the litigants is not the primary concern. However, Justice Marshall sees no advancement of this public interest by allowing a participant to recover from a co-participant who is not "more responsible for the illegality."<sup>92</sup> He feels that the deterrent effects of banishing *in pari delicto* from antitrust law will be nullified, if not surpassed, by the knowledge that one can engage in illegal activities and yet have a possibility of recovering treble damages if the scheme does not produce expected benefits.

Justice Marshall also criticizes the Court's failure to recognize the serious consequences of doing away with the doctrine. First, he can not understand how allowing the defendant to have the "beneficial by-products of a restriction . . . taken into consideration in computing damages"<sup>93</sup> is superior to a limited application of *in pari delicto*. "[S]uch an offset approach . . . clearly permits damages to be awarded when

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88. The provisions relating to territorial restrictions and resale price maintenance were noted as exemplifying provisions which were unfavorable to the respondent.

89. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1990 (1968).

90. 88 S. Ct. at 1990.

91. *Id.*

92. *Id.* at 1991.

93. *Id.* at 1985.

injury is shown to outweigh benefit regardless of the nature of the plaintiff's participation in the scheme."<sup>94</sup> Secondly, "it adds an unnecessarily speculative element to the factual inquiry required in an antitrust case."<sup>95</sup> Furthermore, he asserts that some speculation is usually required in determining damages in an antitrust suit. He believes that any attempt to compute the benefits a plaintiff may have received from provisions for which he is responsible in order to reach the amount of an award in a given case, would result in ever greater speculation and difficulty.

He feels that a "respective fault"<sup>96</sup> approach will not present the problems created by the majority approach in regard to unjust enrichment because it is much easier to determine whether a plaintiff was a true participant in "the formulation and implementation of the various illegal provisions,"<sup>97</sup> than to ascertain whether the damages suffered from some provisions exceed the benefits received from the other anti-competitive provisions. Justice Marshall concludes: "Since I regard a respective fault approach as superior to a damage offset approach on principle, the complication inherent in the latter inquiry merely reinforces my conviction that the Court is being unwise in broadly rejecting the doctrine of *in pari delicto*."<sup>98</sup>

*Justice Harlan and Justice Stewart: Concurring in Part and Dissenting in Part*

Justice Harlan and Justice Stewart view the majority approach as "a bizarre way to 'further the overriding public policy in favor of competition,' . . . [by paying] violators three times their losses in doing what public policy seeks to deter them from doing."<sup>99</sup> Neither do they think they profess a "too 'fastidious regard for the moral worth of the parties' . . . [because they] decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves."<sup>100</sup>

Both Justices feel that the varied views expressed in *Perma*<sup>101</sup> result from a

lack of agreement on a definition of the term "*in pari*

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94. *Id.* at 1991.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1992.

100. *Id.*

101. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

*delicto*," as well as a disagreement, perhaps on the standards that should govern the use of the defense to which that term is properly applied. . . .

Plaintiffs, who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant.<sup>102</sup>

They do not believe that the district court or the court of appeals applied the proper standard, but rather that the courts may have confused *in pari delicto* with the "unclean hands"<sup>103</sup> or "consent" doctrines.<sup>104</sup> A plaintiff who is *in pari delicto* is by definition also a violator of the antitrust laws and subject to a government or third party action; but it is unclear that the courts intended to hold that plaintiffs violated the Sherman Act.<sup>105</sup> If the plaintiffs did not violate the antitrust laws, the situation might be within the "consent" or "unclean hands" doctrines but not within a proper definition of *in pari delicto*.<sup>106</sup>

Justice Harlan and Justice Stewart cite three situations which courts should distinguish from a true case of *in pari delicto*. The first, properly included within the consent doctrine, presents a situation in which the plaintiff knowingly continues to deal with the members of an illegal conspiracy. He has not violated the law, but has merely permitted himself to suffer injury. Secondly, they maintain that courts should distinguish cases like *Kiefer-Stewart*,<sup>107</sup> upon which the majority relies, because in such cases there is no cooperative violation of the law. In *Kiefer-Stewart*,<sup>108</sup> the defendant's illegal action against the plaintiff was a response to prior independent violations by the plaintiff. Finally, they believe that cases such as *Simpson*<sup>109</sup> and *Albrecht v. Herald Co.*<sup>110</sup> should be deemed to fall within the "'coercion' exception to the *in pari delicto* doctrine."<sup>111</sup> In those cases the plaintiffs really had no voluntary choice since a rejection of the terms offered by the defendant would have

102. 88 S. Ct. at 1992.

103. For a discussion of the unclean hands doctrine in antitrust law see Note, *Unclean Hands: The Effect of Plaintiff's Antitrust Violations In Antitrust Actions*, 113 U. PA. L. REV. 1071 (1965).

104. The consent doctrine is applied where a party does not violate the antitrust laws, but assents to a course of action with knowledge that the combination with which he deals is illegal. See Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241, 1247 (1964).

105. 15 U.S.C. § 1 (1964).

106. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1993 (1968).

107. *Kiefer-Stewart Co. v. John E. Seagram & Sons*, 340 U.S. 211 (1951).

108. *Id.*

109. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

110. 390 U.S. 145 (1968).

111. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1993 (1968).

effectively put them out of business. However, they caution that *Simpson*<sup>112</sup> and *Albrecht*<sup>113</sup> may be within the purview of the consent doctrine, since neither decision revealed "where the alleged combination in restraint of trade was to be found"<sup>114</sup> and did not clearly state whether plaintiff's act of entering the agreement was itself a violation of the antitrust laws.

Viewing the complexity of the record, Justices Harlan and Stewart did not feel justified in stating whether the plaintiffs were truly *in pari delicto*. They would remand the case for the reconsideration of the motion for summary judgment using the proper standards "to determine whether any agreement alleged to be in restraint of trade was one for which the plaintiffs were substantially as much responsible, and as much legally liable, as the defendants."<sup>115</sup>

With such divergence of opinion, even among members of the majority, it may be anticipated that more cases will arise requiring clarification of the holding in *Perma* as it relates to specific fact situations. Although the Court's holding encompasses the total area of antitrust law, the inquiry herein is directed at a somewhat more restrictive ground. More specifically, emphasis is placed upon the possible difficulties which may be encountered by the courts in applying the various approaches suggested by the respective Justices to further franchising litigation.

#### APPLICABILITY OF THE SUGGESTED APPROACHES

A varied set of facts in a franchising context will serve to illustrate some of the problems that might be encountered by the courts in applying the different approaches suggested in *Perma*<sup>116</sup> to future franchising litigation. In the following illustrations, the agreements contain provisions similar to those in *Perma*,<sup>117</sup> and each franchisee cancels the agreement three years after acceptance in order to join a competitor's franchise system:

- 1) A owns a muffler shop and sells the same quantity of mufflers manufactured by B, C, and D. B informs A that all mufflers manufactured by B will soon be sold only through franchised dealers under a trade name. A joins the arrangement and thereafter sells only B's mufflers.

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112. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

113. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

114. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1993 (1968).

115. 88 S. Ct. at 1993.

116. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

117. *Id.*

2) A owns several muffler shops and carries none of B's mufflers. B offers A a franchising contract and A joins, fully agreeing that it will be beneficial to both parties and objecting to none of the provisions.

3) A is not in the muffler business. B prepares an agreement greatly favoring itself and offers it to A. Before A agrees to the arrangement, he succeeds in having provisions beneficial to himself inserted and several unfavorable provisions deleted.

### *Application of the Majority Opinion*

An obvious initial difficulty presented to the courts is that the majority does not propose any criteria to fill the void created by the rejection of *in pari delicto*. The Court did not decide "whether truly complete involvement and participation in a monopolistic scheme could even be a basis . . . for barring a plaintiff's cause of action. . . ." <sup>118</sup> Seemingly, such a statement does not provide any guidelines by which the courts can render an opinion with any degree of confidence. If there is a basis to bar a plaintiff's suit, the majority test would seem to require full participation and cooperation by a plaintiff.

If a court is to apply a "full participation and cooperation criterion" to the above illustrations, what elements are necessary to meet the test? The majority would seemingly require that: a plaintiff be an aggressive supporter of the entire "scheme as a necessary part and parcel of it" <sup>119</sup> or "actively . . . [support] the entire restrictive program as such, participating in its formulation and encouraging its continuation;" <sup>120</sup> "voluntarily participat[e] in a meaningful sense;" <sup>121</sup> "actively seek each and every clause of the agreement;" <sup>122</sup> not be forced to abide by the agreement; and not have to accept the agreement as a necessity in order "to obtain an otherwise attractive business opportunity." <sup>123</sup>

In all of the illustrations it would seem that none of the prospective franchisees would have joined the arrangement unless each believed it to be an "attractive business opportunity." <sup>124</sup> Whether or not a proposed franchising system is attractive would appear to rest upon one's business judgment, unless the courts are to employ a hindsight approach. At the time the opportunity presented itself, each franchisee undoubtedly believed

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118. 88 S. Ct. at 1985.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*



it to be "attractive" and expected to benefit. Moreover, it would be hard to imagine a franchise agreement that did not contain some competitive restraints.<sup>125</sup> Without some promise of restraint from the franchisee, the expected benefit to the franchisor would be greatly reduced. The same analysis applies to the requirement that the franchisee "actively seek each and every clause of the agreement."<sup>126</sup> In order to "actively seek and support" the terms of an agreement, is plaintiff-franchisee's mere compliance without objection sufficient or must his participation be a "necessary part and parcel"<sup>127</sup> of formulating the agreement? Surely a defendant would have a difficult task in showing that the plaintiff-franchisee "aggressively sought and supported" provisions unfavorable to himself, even if they were not violative of antitrust laws. Presumably, when a franchisee decides that the whole arrangement, which was initially attractive, is not as profitable as expected or not as advantageous as a newly formed system appears to be, any active support of the arrangement would lessen considerably if not cease altogether. Is a court to ignore the period when the franchisee *did* support the scheme? Apparently, the majority does not consider the problem.

The element of *voluntariness in any meaningful sense* also seems inadequate for application to specific fact situations. The majority does say that recovery should not be denied merely because a plaintiff participates in a scheme formulated by others. But is this a meaningful criterion? The franchisee in illustration 3 above helped draft the agreement and accepted it only after he deemed it to be beneficial and desirable. The only distinction between this arrangement and illustration 2 is that in the latter the agreement was formulated by B, the franchisor. If the final agreement in illustration 2 is the same as that reached in illustration 3, the distinction seems unimportant. Likewise, in illustration 1, it should make no difference which party prepared the agreement if the franchisee completely agrees with the provisions set forth.

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125. A review of currently used franchise agreements suggests a number of areas where antitrust problems can arise. In his statement before the Small Business Administration on March 11, 1966, Professor Handler listed five areas of restrictions and, hence, restraints of trade that "are fairly illustrative of the legal and business problems involved" in franchising distribution. They are:

- A. Exclusive Selling;
- B. Exclusive Buying;
- C. Territorial Restrictions;
- D. Customer Restrictions; and
- E. Quality Control of Trade Marked Products.

Covey, *Franchising and The Antitrust Laws: Panacea or Problem?*, 42 NOTRE DAME LAWYER 605, 608 (1966) (footnotes omitted).

126. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1985 (1968).

127. 88 S. Ct. at 1985.

If coercion is present in any of the illustrations, the task of determining whether the franchisee has a right to maintain an action is immeasurably lessened. The majority reaffirmed the concept of coercion enunciated in *Simpson*<sup>128</sup>—"[the fact] that a retailer can refuse to deal does not give the supplier immunity. . . ."<sup>129</sup> The concept appears to rest on the theory that "non-participation was not a meaningful alternative."<sup>130</sup> But *Simpson*<sup>131</sup> does not explain why or how the alternative of participation or nonparticipation is sufficient to show coercion. In illustrations 1 and 2 the alternative is present. Both franchisees are already in the muffler business and the refusal to deal with the supplier on its terms alone would seem to be good business judgment. An inference could be drawn from the franchisees' acceptance of the agreement that they believed they could make even greater profits by participating in the plan. It would seem difficult for a court to say an entire scheme was thrust upon them or that "they had been forced to accept its more onerous terms as a condition of doing business."<sup>132</sup> The franchisee in illustration 3 appears to be a co-formulator of the agreement and did not assent to the terms until he had succeeded in working out an acceptable contract. Of course, a fictional use of the term coercion could be employed to label the initiation and formulation involuntary.

Unlike *Simpson*,<sup>133</sup> *Perma*<sup>134</sup> fails to suggest what circumstances, arising after implementation of the agreement, amount to coercion. In *Simpson*,<sup>135</sup> the consignment lease presents an effective device by which the consignees were compelled to abide by the agreement, but there is no similar device in *Perma*<sup>136</sup> or in the illustrations. When cancellation occurs, the franchisees could service mufflers from the same locations. In view of this alternative, it would appear that, collectively, the franchisees have some bargaining strength, since the supplier faces the loss of time and expense in establishing the system anew.

The overriding public policy in favor of competition permeates the opinions of *Kiefer-Stewart*,<sup>137</sup> *Simpson*<sup>138</sup> and *Perma*,<sup>139</sup> possibly to the

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128. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

129. *Id.* at 16.

130. Kurland, *The Supreme Court 1963 Term*, 78 HARV. L. REV. 143, 282 (1964).

131. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

132. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1985 (1968).

133. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

134. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

135. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

136. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

137. *Kiefer-Stewart Co. v. John E. Seagram & Sons*, 340 U.S. 211 (1951).

138. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

extent of creating a presumption that plaintiffs have a right to maintain a cause of action. All of the Justices in *Perma* seem to agree with the policy but disagree as to what approach will best further the policy while not rendering litigation labyrinthian. The majority apparently does not attempt to meet the arguments of the concurring and dissenting opinions. Whether the majority approach will actually deter potential violators is questioned by Justices Marshall,<sup>140</sup> Harlan and Stewart,<sup>141</sup> but left unanswered.<sup>142</sup>

Even if a presumption is applied to the illustrations, it is questioned whether permitting the franchisees to recover will serve as a deterrent. All were willing to enter the scheme. Only in illustration 3 can a meaningful argument be made to establish coercion or economic necessity,<sup>143</sup> but even in that instance the franchisee is a co-formulator. All could have cancelled the agreement at any time to operate in less restrictive surroundings, but chose to maintain their franchisee status. Allowing them to recover will presumably deter franchisors from engaging in such activities and thus decrease the illegal opportunities available to prospective franchisees. However, if that were the majority's intention, any difficulties created by the majority opinion could be largely obviated by simply holding that there is no equitable defense to a civil antitrust action. Cases such as *Simpson*<sup>144</sup> and *Perma*<sup>145</sup> would present little difficulty. If the franchisees are able to show that the arrangement is in violation of the law and has caused them injury, recovery would be permitted. Certainly, such a threat would deter suppliers from violating the law.

Even if the franchisees are permitted to maintain an action, how is a court to determine the amount of damages? The majority did state that "[t]he possible beneficial byproducts of a restriction from a plaintiff's

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139. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

140. 88 S. Ct. at 1991.

141. *Id.* at 1992.

142. The growth and success of franchising prompted *Business Week* to title a recent article that reported sixty-five-billion-a-year gross sales in franchised outlets "Franchising Finds It's an Industry." This particular article points out that franchising's big problem is the antitrust laws. . . .

[T]here are hundreds of thousands of franchised businesses in the United States, and they account for a substantial volume of this nation's retail sales. Covey, *supra* note 125, at 606.

143. The contention that coercion is present could be based on the *Simpson* concept—that non-participation was not a meaningful alternate or the idea expressed in *Perma*—that the dealer had to accept the agreement to take advantage of an otherwise attractive business opportunity.

144. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

145. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

point of view can . . . be taken into consideration in computing damages. . . ."<sup>146</sup> This seems to amount to the offset approach mentioned by Justice Marshall.<sup>147</sup> Justice Marshall objects that a plaintiff might be unjustly enriched,<sup>148</sup> but the majority maintains that the public policy of alleviating restraints on competition, not the equities of the case, should be of primary importance. The objection relating to increased speculation in determining antitrust suit damages appears to be justified.<sup>149</sup> If the courts must ascertain the benefits flowing to the plaintiff from each provision controverted by the defendant and repeat the process to determine damages, litigation may increase in speculation and complexity.

### *Application of the Concurring Opinions*

A cursory examination of the concurring opinions creates the impression that they supply substantial guidelines to facilitate the solution of the proposed illustrations. Mr. Justice White agrees with the majority's rejection of *in pari delicto* but, unlike the majority, attempts to provide a standard by which the courts should permit or deny recovery to a plaintiff. Justice Fortas and Justice Marshall, however, articulate the view that a limited *in pari delicto* doctrine should be retained as a defense to private antitrust suits. Each proposes a "test" by which courts are to determine whether a plaintiff should be denied recovery. Mr. Justice White would bar a plaintiff who bears "substantially equal responsibility"<sup>150</sup> for his injury; Justice Fortas would deny recovery "if the 'delicto' is approximately 'pari' "<sup>151</sup> or where it is shown that the parties maintained an "equality of position,"<sup>152</sup> Justice Marshall would not permit recovery where the plaintiff is "substantially equally at fault."<sup>153</sup> Any one of the tests are presumed to be easier to apply than the *in pari delicto* doctrine, which literally means "of equal fault."<sup>154</sup>

Viewing the opinions collectively, the following factors are deemed to be relevant in considering whether or not the franchisees in the above illustrations should be barred: " facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to

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146. 88 S. Ct. at 1985.

147. A defendant might also be permitted to show that the plaintiff's financial rewards from some of the illegal provisions of an agreement out-weighted the harm suffered from other illegal provisions, and accordingly on some sort of offset theory the plaintiff would recover nothing.

88 S. Ct. at 1991.

148. *Id.*

149. *Id.*

150. *Id.* at 1988.

151. *Id.* at 1989.

152. *Id.*

153. *Id.* at 1989, 1990.

154. *Id.* at 1984.

who might reasonably have expected to benefit from the provision of conduct making the scheme illegal under § 1 [of the Sherman Antitrust Act]; proof of whether one party attempted to terminate the agreement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement;”<sup>155</sup> evidence “showing that . . . provisions were inserted into the franchise agreement at the behest and for the benefit. . . .”<sup>156</sup> of the franchisee; or proof that the franchisees “participated in the formulation of the entire agreement.”<sup>157</sup>

In all of the illustrations, B, the supplier, originated or decided to implement a franchising system. Only in illustration 3 did A, the franchisee, actually negotiate in the sense of having provisions inserted that were not included in the original agreement. Are these conclusions meaningful in deciding whether A was more responsible for the scheme than B? As between two conspirators, can it be said that one who formulates an acceptable plan is more blameworthy than one who voluntarily accepts the scheme as presented? It is difficult to see how the fault of A is greater than the fault of B, simply because A struck upon an acceptable scheme. The only difference in illustration 3 is that B's contract was not acceptable as presented and A negotiated with B until the end product was the same as the agreements initially offered in illustrations 1 and 2.

*Simpson*<sup>158</sup> is interpreted to stand for the proposition that “the mere fact that a party enters into an agreement containing provisions that are violative of the antitrust laws with the intent to make money by operating under the agreement is not in itself sufficient to show that he is equally responsible for the existence of the illegal provisions.”<sup>159</sup> Yet the franchisees in illustrations 1 and 2 could be aggressive supporters after accepting the scheme, regardless of who originated or implemented the plan. Also, in illustration 3, the franchisee could become only an acquiescing member, despite participation in the negotiation of the agreement. From this standpoint, an emphasis upon the circumstances giving birth to the illegal combination is not a dependable standard to determine which of the parties is more at fault for an injury suffered by one of them.

A finding of coercion in the illustrations is difficult for many of the reasons suggested in the above application of the majority approach.<sup>160</sup>

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155. *Id.* at 1988.

156. 88 S. Ct. at 1981, 1991.

157. *Id.*

158. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

159. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1990 (1968).

160. See notes 24-26 *supra* and accompanying text.

The expanded theory of coercion is not even discussed by the concurring Justices. Instead, *Bales*,<sup>161</sup> *Jewel*,<sup>162</sup> *Eastman*<sup>163</sup> and *Ring*<sup>164</sup> are noted to provide some guidelines in order to ascertain the presence of coercion. But all of these cases, upon their facts, fall far short of the *Simpson*<sup>165</sup> concept of coercion. The plaintiff in *Ring*<sup>166</sup> had to enter an illegal contract on defendant's terms to save a substantial investment. In *Bales*,<sup>167</sup> it was held that if the complainants accepted the agreement solely out of "business necessity . . . they would not be in pari delicto."<sup>168</sup> The *Jewel* court<sup>169</sup> upheld the plaintiff's claim of economic coercion since he was threatened by union strikes and compelled by an already existing conspiracy to accept the contract. The coercive action in *Eastman*<sup>170</sup> was obvious—the supplier enjoyed a monopolistic position, and after an unsuccessful attempt to purchase plaintiff's business, refused to sell products to plaintiff at other than retail prices. None of the franchisees in the illustrations appear to have entered the arrangement out of business necessity. The franchisees in illustrations 2 and 3 do not even have an economic interest in B's product that could be injured. Even though the franchisee in illustration 1 realizes only one-third of total sales from B's products, it is possible that B can use leverage to influence him. However, B's action seems justified since the product is to be sold only under a trade name and exclusively through franchise outlets.

Evidence relating to benefits derived or injury suffered is seemingly less meaningful in determining respective fault or the equality of responsibility than any of the suggested elements. Each of the franchisees in the illustrations probably expected to benefit from the franchise system or they would not have accepted the agreement. Moreover, how can fault be related to an expectation of benefits to be realized from a business arrangement? Determining who was actually injured or which of the parties benefited really adds nothing to such a factual inquiry. It is submitted that attempting such a determination may provide the fuel for a broad, speculative assumption as to which party was the most responsible. Certainly one is not to assume that there is a sufficient basis for concluding that the defendant was the more responsible party simply

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161. *Bales v. Kansas City Star Co.*, 336 F.2d 439 (8th Cir. 1964).

162. *Jewel Tea Co. v. Local Unions*, 274 F.2d 217 (7th Cir. 1960).

163. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

164. *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945).

165. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

166. *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945).

167. *Bales v. Kansas City Star Co.*, 336 F.2d 439 (8th Cir. 1964).

168. *Id.* at 444. The court apparently did not rely on *Simpson*, since it was not cited as supporting authority.

169. *Jewel Tea Co. v. Local Unions*, 274 F.2d 217 (7th Cir. 1960).

170. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

because plaintiff shows that he has suffered damage. The question of benefit also involves all of the difficulties incurred in reaching the amount of damages.<sup>171</sup> If derivation of benefits is to have a bearing upon plaintiff's right of action, a trial to determine the respective damages or benefits flowing from each provision would seem necessary. Only after an "offset approach" is employed, can a final amount be assuredly assessed as a benefit or damage.

Proof of attempted termination by one party and resulting "resistance or counter-measures"<sup>172</sup> from the other is evidently intended to show the less than equal position occupied by the plaintiff. In none of the illustrations did the franchisees attempt to terminate the arrangement—they simply cancelled it and joined another franchising system. Even if it is assumed that the franchisees did desire to terminate the relationship, what device could be used to force them to remain franchisees? One might expect that the franchisor would naturally try to persuade the franchisees to change their minds since cancellation would result in loss of investment and decreased profits. Of course, if the franchisees are operating successfully and, rather than desiring to abandon the entire system, only want to delete a provision making the scheme illegal, threats of cancellation or other retaliation would seem to amount to a showing of coercion on the part of the franchisor. Successful and effective methods of such retributory action would probably indicate an inequality of position.

The principles set forth in the concurring opinions may well be useful where the plaintiff was obviously not an equal participant; but in a complex situation they seem to be as difficult to apply as the *in pari delicto* doctrine. Nevertheless, the opinions at least suggest some elements for the courts to consider in reaching a conclusion as to equality.

#### *Applicability of the Partially Concurring and Dissenting Opinion*

According to the opinion of Justices Harlan and Stewart, to determine whether the franchisees in the above illustrations are truly *in pari delicto*, the courts need only answer affirmatively the question—did plaintiffs violate "the law in cooperation with the defendant?"<sup>173</sup> If there were no cooperation, *in pari delicto* will not apply. They deem the following principles to be important in any determination of whether the plaintiff-franchisees cooperated to the extent of being *in pari delicto*:

171. See note 154 *supra* and accompanying text.

172. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 1988 (1968).

173. 88 S. Ct. at 1992.

whether the parties are of "equal fault;"<sup>174</sup> whether the coercion exception applies; and whether the plaintiffs are "substantially as much responsible, and as much legally liable, as the defendants."<sup>175</sup>

It seems evident that in the respective illustrations there is no lack of cooperation when viewed with respect to *Kiefer-Stewart*.<sup>176</sup> As pointed out by the opinion, the parties in *Kiefer-Stewart*<sup>177</sup> violated the law independently and there was no agreement between them. But here, all of the franchisees entered into the scheme and abided by the agreement for three years, choosing not to exercise their power of termination.

Neither does it appear that the franchisees come within the coercion exception, thus rendering their cooperation involuntary and their fault minimal. *Simpson*<sup>178</sup> is not decisive on the question of coercion as applied to the illustrations, for the same reasons advanced in the above applications of the majority and concurring opinions to the illustrations.<sup>179</sup> Furthermore, an application of the *Simpson*<sup>180</sup> theory of coercion is even more indecisive if *Simpson* is so unclear that it may be considered as a possible consent case.<sup>181</sup> Nor do the franchisees have only the choice of accepting terms dictated by the supplier or ceasing business. The franchisee's total sales in illustration 1 may decrease initially, but he can simply add another brand of muffler to his stock. In illustration 2, the franchisee does not depend upon products from B; and in 3 the prospective franchisee has no business. Thus, none of the franchisees would appear to be substantially affected by refusing to deal with the supplier.

Do any of the illustrations represent a consent situation? In light of the *Perma*<sup>182</sup> decision, the question should be answered negatively. Even Justice Harlan and Justice Stewart agree that *Perma*<sup>183</sup> involves *in pari delicto* and the slight variation of circumstances presented in the illustrations does not render the application of the doctrine inappropriate.

The bargaining criterion would apparently operate to bar an action brought by the franchisee in illustration 3, since he would appear to be "in equal fault." The agreement was entered into only after the franchisee succeeded in having beneficial provisions inserted and unfavorable provisions deleted. A distinction resting upon the reasoning that the parties

174. *Id.*

175. *Id.* at 1993.

176. *Kiefer-Stewart Co. v. John E. Seagram & Sons*, 340 U.S. 211 (1951).

177. *Id.*

178. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

179. See notes 128-36 and 161-70 *supra* and accompanying text.

180. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

181. See note 114 *supra* and accompanying text.

182. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968).

183. *Id.*



did not trade off anticompetitive agreements seems unwarranted. If the franchisees in illustrations 1 and 2 accept the agreement as drafted, in the absence of a coercion or consent situation, their fault would seem to be as great as the franchisee in illustration 3.

#### CONCLUSION

The *Perma*<sup>184</sup> decision embodies a directive to the lower courts to not concern themselves greatly with the equities of the case and to allow plaintiff's suit whenever possible. This is not to say the equities are to be disregarded. In reality, only the phrase *in pari delicto* has been rejected as an antitrust defense. Much of the substance remains. Although the majority does not expressly hold that "equality of fault" of some type will be a defense, it can be inferred that there is such a defense. The Court seems to believe that if everyone were permitted to maintain an action, violation of the laws might be encouraged, thus injuring competition rather than furthering it. Also, five Justices would hold that in an action brought by a true conspirator, recovery will not be permitted.

In the recent case of *Morton v. National Dairy Products Corp.*,<sup>185</sup> the *in pari delicto* defense was raised. By way of dictum, Justice Lord stated, "Sealtest demonstrated a plausible defense of *in pari delicto*. Such a defense has been completely negated by the Supreme Court in *Perma* . . ."<sup>186</sup> Only the majority opinion was noted. It is doubtful that other courts will have such an easy job when the defense is phrased "equality of responsibility or fault" rather than "*in pari delicto*."

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184. *Id.*

185. 287 F. Supp. 753 (E.D. Pa. 1968).

186. *Id.* at 765.